In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1231

TEXACO INC., ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

In the administrative proceeding out of which this case arises, the Federal Power Commission issued a number of certificates of public convenience and necessity authorizing the sale of natural gas from fields in the Texas Gulf Coast area at a price not to exceed 16 cents per Mcf. The Commission based its price determination on evidence of current gas prices in the area, and affirmed its examiner's exclusion of economic and financial evidence proffered by the producers in an attempt to justify a higher price.

The Court of Appeals for the Tenth Circuit upheld the issuance of the certificates at the 16-cent price, and approved the exclusion of the producers' evi-

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dence. The petitions for certiorari filed by two distribution companies—*United Gas Improvement Co.* v. *Sunray DX Oil Co.*, No. 1134, this Term, and *Brooklyn Union Gas Co.* v. *Federal Power Commission*, No. 1135—challenge the court's approval of the 16-cent price, which these distributors contend is too high.[1] The conditional cross-petition, filed by the producers, seeks review of the court of appeals' affirmance of the Commission's exclusion of their economic and financial evidence in the event that the Court agrees to review the distributors' challenge to the 16-cent price. We believe that the conditional cross-petition should be dismissed as untimely. Alternatively, we submit that it should be denied, the issue tendered in the petition having been decided against the petitioners in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

1. The judgment of the court of appeals was entered on December 9, 1966. The conditional cross-petition was not filed until April 7, 1967, more than 90 days after the entry of the judgment below, and no extension of time was sought within the 90-day period. Section 2101(c) of the Judicial Code (Title 28 U.S.C.) provides that a petition for certiorari in a civil case must be filed "within ninety days after the entry of [the] judgment or decree", unless the time is extended by order of a Justice of this Court. This statutory limitation is jurisdictional and there is no

[1] Their petitions also challenge—as does the Commission's (*Federal Power Commission* v. *Sunray DX Oil Co.*, No. 1133)—the court's other holding, disallowing refunds of amounts collected in excess of the 16-cent rate during a period of temporary authorization.

exception for conditional petitions. See *Alaska Industrial Bd.* v. *Chugach Elec. Assn.*, 356 U.S. 320, 325; cf. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206. Petitioners' suggestion (Supplement to Conditional Cross-Petition, p. 2) that the evidentiary question they seek to tender was not ripe for review by this Court until the distributors filed their petition challenging the 16-cent price as too high is unsound. The instant petitioners argued in the court of appeals that the 16-cent price was too low, relying on what they deemed the Commission's error in excluding their evidence. Obviously, they could have renewed that contention in this Court by a timely petition whether or not the distributors had petitioned.

Producer's reliance on *Pierson* v. *Ray*, Nos. 79 and 94, this Term, decided April 11, 1967, appears misplaced. One issue in No. 79 was whether civil rights demonstrators should be denied recovery in a damages suit against police officers for false arrest if they acted in anticipation that they would be illegally arrested. The cross-petition (No. 94)—filed, as here, out of time—raised the question whether the police officers were entitled, contrary to the lower court's holding, to assert the defense of good faith and probable cause. Since both questions involved the scope of the police officers' defense, the question in No. 94 could reasonably be viewed as subsumed in the question timely presented by No. 79. Accordingly, an independent jurisdictional basis for No. 94 was not necessary, and its untimeliness was therefore not crucial. We note, too, that petitioners in No. 79 did not suggest any jurisdictional defect in the cross-petition.

But it cannot be argued here that the untimely challenge to the court of appeals' affirmance of the exclusion of the proffered financial and economical evidence is subsumed in the distributors' challenges to the 16-cent price as too high. The issues are discrete. The distributors' petitions challenge only the Commission's reliance on temporary certificate and contract prices and implicate no question relating to the admissibility of the producers' evidence or suggesting that the 16-cent price may be, not too high, but—as the producers contend—too low.

2. In *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 227–228 and n. 3, this Court held that in producer certificate cases the Commission may properly exclude financial and economic trend evidence. The Commission here excluded such evidence on the same basis approved in *Callery* (J.A., Nos. 1133, 1134 and 1135, 368, 234–260). Since the conditional cross-petition is thus no more than an attempt to reargue *Callery*, it does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be dismissed or, alternatively, denied.

Respectfully submitted.

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